

STATE OF MICHIGAN  
COURT OF APPEALS

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KIMBERLEE LYNN MUSSELMAN,

Plaintiff-Appellee,

v

BRIAN DAVID MUSSELMAN,

Defendant-Appellant.

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UNPUBLISHED

September 10, 2002

No. 232885

Midland Circuit Court

LC No. 97-006337-DM

Before: White, P.J., and Neff and Jansen, JJ.

JANSEN, J. (*dissenting*).

I respectfully dissent because I conclude that the trial court abused its discretion in awarding attorney and other fees.

Although a trial court may award attorney or other fees in a divorce action, it should do so only as “necessary to enable the adverse party to carry on or defend the action, during its pendency.” MCL 552.13(1). MCR 3.206(C)(2) directs that the party who requests attorney fees and expenses must allege facts sufficient to show that she is unable to bear the expense of the action and that the other party is able to pay.

Here, the parties reached a settlement in which plaintiff received various non-cash and cash assets, including a payment of \$306,000, which represented a fifty percent interest in the value of defendant’s shares of stock in International Engineering, Inc. Defendant similarly received both liquid and non-liquid assets. In its decision on remand, the trial court observed that the case pended for two years, and the inability to reach a settlement at an earlier stage of the proceedings was caused by acrimony between plaintiff and defendant’s family, rather than conflict between plaintiff and defendant. The trial court concluded that unreasonable conduct by defendant’s family members forced plaintiff to incur additional expenses. In addition, the trial court noted that while defendant’s assets from IEI were available to him to meet his needs, plaintiff’s income potential was fairly limited, and her ability to support herself and the parties’ child depended primarily on her prudence in managing the assets received in the property settlement.

I agree with defendant that the trial court articulated insufficient reasons for awarding plaintiff attorney and other fees, and the award constituted an abuse of discretion. Both plaintiff and defendant received substantial assets, liquid and non-liquid, in the property settlement. The undisputed evidence established that plaintiff was employed, but that defendant could not work

because of a total and permanent disability. The trial court's finding that plaintiff's ability to support herself and the parties' child was virtually wholly dependent on her ability to manage the assets she received in the property settlement was not supported by the record.

The trial court's finding that defendant had the ability to pay the fees requested by plaintiff was based on a finding that IEI is a successful, ongoing business, and that defendant could use those assets to support himself and to pay plaintiff's fees; however, the trial court did not articulate the facts on which it based its apparent assumption that the assets of IEI, a closely-held family business, could be easily liquidated and accessed by defendant. A party is not required to invade assets to pay fees when the party is relying on the assets for support. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995).

In addition, the trial court relied on *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992), and justified its award of fees to plaintiff in part on the fact that relations between plaintiff and defendant's family were acrimonious, and this conflict delayed settlement. However, the trial court did not attribute defendant's family's conduct to defendant himself, and did not suggest that defendant could have controlled his family's conduct. The record did not support a finding that plaintiff was forced to incur additional expenses due to any unreasonable conduct by defendant, and in fact the trial court specifically found to the contrary in its original decision awarding fees to plaintiff.

Plaintiff did not allege facts showing she did not have the ability to pay the fees, but defendant did have that ability, especially given that plaintiff obtained a payment of \$306,000. MCR 3.206(C)(2). Moreover, the facts did not establish that plaintiff was forced to incur unnecessary expenses because of any unreasonable conduct directly attributable to defendant. Under the circumstances, the trial court abused its discretion by granting attorney and other fees to plaintiff in the amount of \$31,920.

I would reverse the award of attorney and other fees.

/s/ Kathleen Jansen